REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CR. APPEAL NO. 18 OF 2000

FREDRICK MAROFU MUKILE …… APPELLANT

VS

REPUBLIC ……. APPELLANT

J U D G M E N T

The appellant was tried and convicted for the offence of cheating contrary to section 315 of the Penal Code. The particulars of the offence are that on diverse dated between 21st and 25th day of June 1999 at Namuyemba village in Bungoma District within western province jointly with another already before court by means of fraudulent trick obtained cash in the sum of Ksh.36,000/= from Hellen Wandia Nderitu that he will double it to the said Hellen Wandia Nderitu at the rate of Ksh.10,000/= for Ksh.100,000/=.

The appellant was then sentenced to serve three years imprisonment. Being aggrieved he now appeals to this court. He has put forward five main grounds of appeal which I will deal with them shortly.

The facts of this case are that on the 21.6.99, the complainant Hellen Wandia Nderitu took a sum of Ksh.10,000/= to the appellant in his house in exchange of a sum of Ksh100,000/= but before the deal was done 3 people who posed as policemen entered the house and arrested the appellant. The complainant bribed them with a sum of Ksh.5,000 through a Mr. Wanjala so that the Ksh.100,000/= could be released. However the Ksh.100,000/= was not released to the complainant despite waiting upto 6.00 p.m. in the house of the appellant.

On the 22nd day of June 1999, the complainant met the appellant at Ark Hotel who informed her that he was arrested for failing to register his company which company was scheduled to assist her. The appellant proposed to the complainant to visit the company's offices at Eldoret to seal their deal which was said to have been interrupted by the police. The complainant was convinced and she paid a sum of Ksh. 17,000 to the appellant to be a member of the appellant's company known as Ramji Shah & Co upon which she was given a membership card. She also applied for loan in the sum of Ksh.100,000/= from the company. The company promptly responded and required the complainant to pay a deposit of 25% of the loan applied for. She could not raise the funds so she made arrangements to meet the appellant and his associates to discuss alternative ways of securing the loan. Since she was desperate she ended up paying to the appellant's associate another sum of Ksh.4,000/= as an inducement to push for the deal to be sealed by the company. She was told to go back to Bungoma to wait for a positive answer.

On 13.7.99 it daunt on the complainant that the deal was a farce and she reported the matter to the police. The police commenced investigations which culminated to the arrest of the appellant and another. Various documents were recovered in the possession of the appellant.

The first ground raised by the appellant is that the evidence adduced could not sustain a conviction.

The appellant attacked the evidence of P.W. I for not reliable nor credible in the circumstances of this case. The character of the complainant was brought into play. It was further submitted that her evidence indicate that she committed a criminal offence in the process of pushing for the deal complained of.

I have perused the record of appeal and I think this ground has merit. The whole episode show that the complainant would do anything possible including subverting the law for her own selfish benefit. The record reveals that she even bribed a police imposter by the name Wanjala to ensure that the secret deal succeeded. The credibility of her evidence therefore is doubted. I have formed the opinion that she was not a straightforward witness. The court of appeal stated in the case of **NGUNGU KIMANJI VS REPUBLIC (1979) K.L.R. 282** that:

> *"The witness in a criminal case upon whose evidence it is*
>
> *proposed to rely should not create an impression in the mind*
>
> *of the court that he is not a straightforward person, or raise a*
>
> *suspicion about his trustworthness, or do (or say) something which*
>
> *indicates that he is a person of doubtful integrity, and therefore an*
>
> *unreliable witness which makes it unsafe to accept his evidence."*

I accept this dictum to be applicable in this matter. The trial magistrate therefore failed to appreciate this fact which was glaringly clear. It is unfortunate that there are no other independent credible evidence to support the complainant's case save for her now discredited evidence.

The other remaining grounds of appeal is in respect of the fact that the prosecution did not prove its case to the standard of beyond reasonable doubt. I have no doubt that the prosecution proved its case beyond reasonable doubt before the trial court but the same cannot sustain a conviction because the evidence have been discredited. The complainant is a witness of doubtful integrity.

It has also been stated that the sentence meted out was harsh and manifestly excessive. I have already stated that the appellant was sentenced to 3 years imprisonment. The law provides under S.315 of the penal of the penal code for a maximum sentence of 3 years. The record shows that the appellant was a first offender. The trial court did not take into account that fact or even refer to his mitigation. In fact the learned trial Resident Magistrate simply said:

> *"The accuseds conduct calls for a deterrent sentence."*

The principles of sentencing are well settled. This court restated the position in the case of WANJEMA VS REPUBLIC (1971) E.A. 493.

> *"That an appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took i nto account some immaterial fact, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."*

In this instant case, it is clear that the learned Resident Magistrate overlooked the fact that the appellant was first offender. It is also clear that she did not specify the reasons why a first offender like the appellant would be given a maximum sentence prescribed by law. In my humble view the sentence is considered manifestly excessive and harsh. A lighter sentence would have been tendered instead.

The learned senior state counsel, Mr. Kemo conceded to this appeal. I have formed the opinion that he correctly conceded.

The final result is that this appeal must succeed. It is allowed. The conviction is quashed and the sentence is set aside. The appellant is hereby set free forthwith unless lawfully held.

DATED AND DELIVERED THIS 28TH DAY OF MAY 2004

J.K. SERGON

JUDGE